

Chen (Migration) [2018] AATA 4825 (16 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Meixin Chen
VISA APPLICANTS:	Mr Keting Wu Miss Tong Wu
CASE NUMBER:	1714517
DIBP REFERENCE(S):	BCC2016/2019243
MEMBER:	Hugh Sanderson
DATE:	16 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 16 October 2018 at 2:27pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – genuine and continuing relationship – married in home country – lack of knowledge of other’s circumstances – joint bank account – financial contribution – details of arrangements within the home – phone contacts – recognition of family and friends – consistent personal information – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 7 June 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 11 June 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained two subclasses: Subclass 309 (Spouse (Provisional) and 310 (Interdependency (Provisional)). The visa applicant has made claims only for the Subclass 309 visa and does not claim to be in an interdependent relationship as required by Subclass 310.
3. The criteria for the grant of a Subclass 309 visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the visa applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner (the review applicant).

Background

5. The visa applicant is a citizen of China and is currently 40 years old. He has been previously married on two occasions. He has a daughter from his first marriage who is the second named visa applicant. She is currently 13 years old.
6. The visa applicant's movement records show that he has travelled to Australia on Visitor visas as follows:
 - From 17 November 2014 to 10 February 2015;
 - From 14 June 2015 to 6 September 2015;
 - From 10 September 2015 to 2 December 2015; and
 - From 11 December 2015 to 7 March 2016.
7. The review applicant was born in China and is currently 44 years old. She is a citizen of China but has the right to reside permanently in Australia. She has previously been married on two occasions and has one child from her first marriage, Jiaying Liang who is currently 22 years old.
8. The review applicant's movement records show that she has travelled out of Australia over the following periods:
 - From 3 April 2013 to 17 April 2013;
 - From 16 March 2016 to 13 April 2016;
 - From 5 September 2016 to 19 September 2016;

- From 16 October 2017 to 6 November 2017; and
 - From 12 March 2018 to 26 March 2018.
9. The parties claimed that they first met each other on 12 April 2013 when the review applicant was visiting China. They met up again in November 2014 when the visa applicant was visiting Australia. When the visa applicant returned to Australia in June 2015 with his mother they met up again and decided to get married. The parties were married on 18 March 2016 in China.
 10. The applicant provided various documents in support of the application, including telephone and text message records and photos of the parties together. Statements were provided by friends claiming that they believed the relationship was genuine. The applicant and the review applicant were interviewed by officers from the Department.
 11. The delegate who considered the application noted the following issues:
 - Although claiming to have provided financial support to the review applicant, there was no evidence the visa applicant has provided any financial support to the review applicant or any other financial aspects of the relationship;
 - The parties had not claimed that they had established a household together at any time which, as the visa applicant had spent extensive time in Australia, appeared unusual particularly as the parties had expressed their deep love for each other since November 2014;
 - The explanation that the visa applicant gave that he was travelling with his mother to inspect properties to purchase was not plausible as he had claimed he had visited Australia regularly to be able to spend time with the review applicant;
 - The parties claimed to have lived together in China when the review applicant was visiting, however, the review applicant gave inconsistent information as to the activities of the visa applicant's daughter and whether she was staying in the home of the visa applicant throughout the time that she was claiming to stay there;
 - The parties provided photos of themselves with different people and had a wedding banquet where only about 10 people were invited;
 - Despite the visa applicant having about 300 WeChat contacts he said that only about three of those people were aware of the claimed relationship;
 - When interviewed, the visa applicant was unable to provide any details of the review applicant's friends in Australia despite the review applicant claiming that the visa applicant had met about seven or eight of her friends in Australia;
 - When interviewed, the review applicant said that only one of her friends, Xiao Yu, knew that she was married to the visa applicant, however, when that person was contacted by the Department they said that they believed the review applicant was single;
 - The WeChat records of the parties disclosed a superficial record of communication between the parties;

- When interviewed, the parties were unable to provide information about each other, such as their financial position, the arrangements in their homes, or any other details of their relationship; and
- Overall, the parties displayed a lack of knowledge or understanding of each other's circumstances.

12. Taking account the above matters, the delegate was not satisfied that the parties were in a genuine and continuing relationship and therefore that the visa applicant was not the spouse, as defined in s.5F of the Act, of the review applicant. Accordingly, the delegate found that the applicant did not meet the criteria in cl.309.211 and cl.309.221 and refused the application. As the visa applicant did not meet the criteria for the grant of the visa and as the only basis of the application of the second named visa applicant was that she was a member of the family unit of a person who met the primary criteria, her application was also refused.

Information to the Tribunal

13. The parties provided further information to the Tribunal including telephone records, correspondence addressed to the parties, numerous photos of the parties together at various social events and bank records. A statement was provided by the visa applicant in support of the application.
14. The review applicant appeared before the Tribunal on 8 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, the review applicant's daughter and the visa applicant's mother. The review applicant was represented in relation to the review by her registered migration agent.
15. The visa applicant of the review applicant provided consistent information as to various aspects of their relationship. This included providing details of their financial affairs, their work, the activities of their children and the activities they participated in together when the review applicant has travelled to China. They provided consistent details of their plans for their future together in Australia.
16. The review applicant's daughter gave evidence in support of the application. She was very supportive of the relationship between her mother and the visa applicant. She gave inconsistent information as to the amount of time that she had spent with the visa applicant and his family when she had been visiting China. In other aspects of her evidence she appeared to exaggerate any claimed relationship she had with the visa applicant. She gave other evidence which was consistent to other evidence provided to the Tribunal.
17. The visa applicant's mother gave consistent information as to her contact with the review applicant. She believed the relationship was genuine and was positive about aspects of the relationship. She indicated that she had talked with the visa applicant about his sponsoring her to come to Australia, but no decision had been made about this. This was inconsistent to the information provided by the visa applicant and the review applicant.
18. The review applicant provided several statements to the Tribunal after the hearing. This was primarily to address various inconsistencies that had been raised during the hearing and other concerns raised by the Tribunal.
19. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the visa applicant is the spouse, as defined in s.5F of the Act, of the review applicant.

Whether the parties are in a 'spouse' relationship

21. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who has the right to reside permanently in Australia.
22. 'Spouse' is defined in r.1.15A of the Regulations and provides that a person is the spouse of another where the two persons are either in a married or de facto relationship. Persons are in a de facto relationship if they are not validly married to each other. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: r.1.15A(1A). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

23. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in China on 18 March 2016. There is nothing to indicate the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by r.1.15A(1A)(a).

Are the other requirements for a spousal relationship met?

Financial aspects

24. The parties opened a joint bank account while the visa applicant was in Australia on a Visitor visa prior to their marriage. The visa applicant has a bank account in his sole name in Australia and the review applicant has a bank account in her sole name in Australia. It was claimed the parties opened a joint bank account so that the visa applicant could deposit money into that account for the benefit of the review applicant. Despite this claim, the visa applicant has been able to deposit money directly into the account in the review applicant's sole name. There does not seem to have been any reason for the opening of a joint bank account in the names of the parties apart from generating information to support the claim that the parties are in a genuine relationship.
25. The visa applicant has, on occasions, sent money to the review applicant. It was claimed that this money was sent to provide financial support to the review applicant when she was not employed full-time and to support her in making her mortgage payments. The Tribunal places some weight on this financial contribution by the visa applicant to the review applicant's expenses. The review applicant has access to the visa applicant's bank account in his sole name in Australia and has used it in the past.

26. There is little further that would indicate the financial aspects of the parties affairs indicate they are in a genuine and continuing relationship. As the parties live in separate countries and both parties work and are financially independent the fact that there is no clear evidence of the parties pooling their financial resources or sharing liabilities is not surprising. The Tribunal finds that the financial aspects of the parties relationship are what would be expected of parties in a genuine relationship who are living in separate countries and are both employed and financially independent.

Household

27. The parties were married in China on 18 March 2016. The review applicant stayed with the visa applicant in his home at that time. Since then, she has travelled to China in three separate occasions for 14 days, 20 days and 14 days. Over this time, she lived with the visa applicant in the home he shares with his mother and daughter.
28. The parties provided consistent information to the Tribunal as to different aspects of the home of the visa applicant. This included details of the arrangements within the home, the details of when the visa applicant's daughter stays in the home, the arrangements for cooking and cleaning and other domestic activities within that home.
29. Although there is only limited information which would indicate that the parties have established a household together, this again is not surprising as the parties live in separate countries. That the parties were able to provide consistent information as to the arrangements within the visa applicant's home indicates the review applicant has spent significant time there with the visa applicant and his family. This supports a finding that the parties are in a genuine relationship.

Social aspects

30. The parties first met each other in China in April 2013. Their relationship was rekindled when the visa applicant was in Australia with his mother on a Visitor visa in November 2014. The parties were married in China on 18 March 2016 after the visa applicant returned there after spending a considerable period in Australia on a Visitor visa.
31. The parties are provided numerous photos of themselves together dissipating in various social activities with friends and family members. The review applicant's daughter and the visa applicant's mother gave evidence to the Tribunal as to their understanding of the relationship. The information provided by the visa applicant's mother indicated that she was aware of different aspects of the review applicant's life which showed that she had spent significant time with her discussing personal issues.
32. Both parties indicated that they have only a few close friends and that the review applicant and the visa applicant were aware of details of their respective close friends. It was noted that the visa applicant is self-employed as an employment broker. This involves having numerous contacts with employers and those seeking employment. It was explained that he keeps his work contacts on his social media account which explained why he had over 300 contacts on his WeChat account. As these are primarily work contacts rather than friends of the visa applicant, it is not surprising that the majority do not know of his relationship with the review applicant and that the review applicant would not know the details of all his work contacts.
33. The review applicant's daughter gave evidence in support of the application. She provided details of the visa applicant's life in China and she claimed to have spent time with the visa applicant when she has returned to China on occasions for visits. The review applicant's daughter appeared to exaggerate her evidence to support the claim that the parties were in

a genuine relationship. This included exaggerating the time that she has spent with the visa applicant including claiming that she has stayed overnight with him and that he would collect her from the work she was participating in while staying in China. This information was contradicted by the visa applicant who claimed that although he did spend time with the review applicant's daughter when she was in China, including going out for meals together, she had never stayed overnight with him and that for the majority of the time she was in China she spent with her biological father or staying with other family members. He also stated that she would often travel to see other friends she has in China.

34. The information provided by the review applicant's daughter indicated that she was aware of different aspects of the visa applicant's life. This indicated that she does have some contact with the visa applicant and is aware of different personal issues in his life. She also provided information as to the amount of contact her mother has with the visa applicant. It appears, however, that she exaggerated the amount of contact she does have with the visa applicant when she is in China in the belief that this would increase the likelihood of a finding that the parties are in a genuine relationship. Quite the opposite, the fact that the review applicant's daughter provided this information calls into question the credibility of all information provided by the parties in support of the application.
35. The information provided by the visa applicant as to his contact with the review applicant's daughter was plausible. He referred to the fact that when the review applicant's daughter was visiting China that she had other priorities in the people she spends time with. This included her biological father, other family members of her mother and other personal friends she has in China. The amount of contact that he described that he did have with the review applicant's daughter was plausible in light of the fact that he had only married her mother in 2016 and the review applicant's daughter is a 22-year-old woman with other priorities than spending time with her mother's new husband.
36. Overall, the Tribunal finds that the parties do represent themselves as being in a married relationship and that this relationship is recognised by their friends and family. The parties have in the past dissipated in various social activities including travelling together in China. The Tribunal finds that the social aspects of the relationship indicate the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

Commitment to each other

37. The parties were married on 18 March 2016. They have now been married for over two years. Over that period, the review applicant has returned to China on three occasions to spend time with the visa applicant.
38. The Tribunal was provided with numerous screenshots of texting between the review applicant and the visa applicant as well as telephone records showing regular calls between the parties. The parties provided consistent information as to various personal aspects of their relationship. This included details of each other's work, their social activities, and issues in the life of the review applicant's daughter and the visa applicant's mother. They provided information as to their plans for their future including the purchase of real estate and whether they intended to have any children together. They provided information about what the visa applicant's mother may do if the visa applicant is granted a visa to live in Australia. The degree of the knowledge that each parties displayed of each other's lives indicates that they are regularly in contact with each other and that they have discussed with each other aspects of their personal lives and their worries and concerns. The fact that they have been willing to confide in each other as to these issues indicates they provide a degree of companionship be expected in a genuine relationship.

39. The Tribunal is satisfied that the parties display the degree of companionship and emotional support which would be expected in a genuine relationship. The plans they have together indicate the parties consider their relationship as long-term and exclusive.

Overall assessment

40. The Tribunal has considered all the information before it both individually and cumulatively. There are some aspects of the claims made by the parties which give concern as to whether the parties are in a genuine relationship. The fact that they opened a joint bank account with each other for what appears to be no other reason than to generate a document to support the claim that they are in a genuine relationship and that the review applicant's daughter was willing to exaggerate her contact with the visa applicant calls into question all the information provided in support of the application.
41. Despite this, however, the Tribunal is satisfied that the parties do have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing. The degree of knowledge that each party had as to various personal aspects of each other's lives, the knowledge they had about other important people in each other's lives including the visa applicant's mother and the review applicant's daughter, and the plans they had for their future leads the Tribunal to make a finding that the parties are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others and that they intend to live together.
42. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
43. Therefore the visa applicant meets cl.309.211 and cl.309.221.
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
45. As the application of the visa applicant is now to be reconsidered, the Tribunal remits the application for the second named visa applicant who has applied as a member of the family unit of the visa applicant to now be reconsidered in full.

DECISION

46. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.